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NO. 460

IN THE

Supreme Court of the United States

October Term, 1965

WILLIAM L. PALMER, SR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

William L. Palmer, Sr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming his conviction for dispensing drugs which had moved in interstate commerce, in violation of 21 U.S.C. Section 353.

Opinion Below

The District Court for the Southern District of Texas did not render an opinion. The opinion of the Court of Appeals is reproduced as Appendix "A" to this petition.

Jurisdiction

The opinion (Appendix "A") and judgment (Appendix "B") of the Court of Appeals are dated December 7, 1964, and a petition for rehearing, timely filed, was denied on June 23, 1965 (Appendix "C"). By order dated July 19, 1965, Mr. Justice Clark enlarged the time for filing this petition to and including August 20, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Does a United States District Judge have a duty to declare a mistrial, or to take any other appropriate action, when he learns in open court that the lawyer he appointed for an indigent defendant only a week earlier, has failed to investigate the facts of the case, has not bothered to study the statutes under which the prosecution was initiated, and argues that the defendant ought to be convicted?

2. Whether a defendant is denied the due process of law secured by the Fifth Amendment when the jury is allowed to read newspapers containing prejudicial and inadmissible evidence in the very precincts of the courtroom?

Constitutional Provisions Involved

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

The Sixth Amendment to the United States Constitution provides, in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Statement of the Case

For the purposes of this petition, the facts may be swiftly compressed:

Government agents testified that the Petitioner (a wholesale drug distributor) and his son participated in the unlawful sale of amphetamine tablets, in violation of 21 U.S.C. 353. Both men were represented by the same lawyer at the outset (R. 2), but when the son pleaded "Guilty" (R. 15), that lawyer was permitted to withdraw as counsel for the father, in apprehension of a conflict of interest (R. 22). The Court appointed a lawyer for the father. Although appointed counsel had only one week to prepare for trial (R. 20, 25), he announced ready (R. 27). It is that lawyer's conduct of this case which gives rise to this request for review.

The sworn testimony of the son was that he usually drank two fifths of bourbon a day (R. 313), that he was "very seriously ill mentally" (R. 381), and that the father did not participate "in any of these alleged acts or course of conduct that are generally recited in the indictment." (R. 394). We would be less than candid if we did not concede that there is substantial evidence to the contrary from prosecution witnesses.

This conflict in the evidence emerged at the very outset of the trial, when the parties were invited (R. 50) to deliver opening statements. After the prosecution outlined its theory (R. 51-56), Petitioner's court-appointed lawyer said:

"May it please the Court.

Ladies and Gentlemen of the Jury, I have heard Mr. Munsey's opening statement, and if he proves everything he says he is going to prove, all you can do is convict.

"I agree with a lot he has said in referring to Bill Palmer, Jr., who is not on trial here today. But certain things he says about the activity of my client, Mr. Palmer, Sr., from the information that I have presently, it is incorrect. All I would ask you to do, like the Court instructed originally, is wait until all the testimony is in. Give me my shot. Keep an open mind. Those witnesses that you saw leave out of here, to be honest with you I do not know what they are going to testify to.

"I had a conversation with my client and his son, and that is about all that I have done in the way of, well, information, let's put it that way.

"I just ask you to defer any judgment that you might make as to the guilt or innocence until all of the evidence is in.

"But like I said originally, if they can prove what he maintains, you have got just one job, one judgment to make, and that is guilty. But we do not believe that is the set of facts. So, if you will bear with me and give me my time—I am rather flying by the seat of my britches—let's see what did happen.

"Thank you." (R. 56-57)

The court-appointed counsel's fetish with "the seat of my britches" lasted until the very end of the trial. During closing arguments to the jury, counsel twice re-iterated that he was "flying by the seat of my britches" (R. 564, 585). At the beginning (R. 56) and at the end (R. 564)

of this trial, appointed counsel made it clear that he interviewed no witnesses other than the defendants:

> "I had occasion to talk to two witnesses at that time. I had no idea what the Government was going to put on in the way of proof, and that was the extent of my witnesses, my client and his son." (R. 564)

The record reflects no evidence of an attempt to interview prosecution witnesses, an explicit disclaimer of requested instructions to the jury (R. 554, 555), and a total absence of objections to the charge (R. 609). In cross-examination of one prosecution witness, the defense attorney said, "I do not know the Food and Drug Statutes, to be honest with you." (R. 229).

The record does not reveal that the jurors were cautioned about their duty to refrain from reading newspapers until just before the arguments of counsel (R. 552).

In a motion for new trial (R. 770), defendant alleged that the jurors had been directly exposed to prejudicial newspaper reports recounting inadmissible evidence. An affidavit of one juror was filed in support of this motion (R. 777) and at the hearing on this motion (R. 622-709). Newspapers were in the jury room while evidence was being taken (R. 669) and one juror pointed out to another that there was an article in the papers about the Palmer case (R. 685-687). Newspapers published during the period in question were introduced in evidence as Exhibits 1, 2 and 3 on the motion for new trial (R. 694-695) and the articles concerning this case are reprinted as Appendix "D" to this petition.

Reasons for Granting the Writ

The nationwide renaissance in criminal law which has resulted from this court's opinion in *Gideon v. Wainright*, 372 U.S. 335, will halt if the perfunctory representation shown here satisfies the constitutional right to assistance of counsel.

Minimum standards for the conduct of appointed attorneys must certainly require that witnesses be interviewed (and this lawyer did not interview them; R. 56, 564), that counsel know what is provided by the statutes under which the prosecution is brought (and this attorney did not know them; R. 229) and that counsel make some effort to argue that the client should be acquitted (but this lawyer argued that they should be convicted; R. 56-57).

If "representation in the role of an advocate is required" (*Ellis v. United States*, 356 U.S. 674, 675), and if it is the "effective" assistance of counsel which the Constitution commands (*Powell v. Alabama*, 287 U.S. 45), the representation in this case does not fill the bill.

Certainly the trial judge, on his own motion, had a duty to inquire into the circumstances once he learned that counsel had neither interviewed witnesses nor read the law. To expect this lay petitioner to do so, when the very reason for appointment of counsel is to remove the disadvantage stemming from ignorance of the law, is to place an undue burden on the one person in the courtroom who is least likely to realize that he is not being competently assisted.

With regard to the newspaper articles introduced in evidence (R. 694-695; Appendix "D"), it should be

apparent from the guarded and reserved answers of the jurors after the trial (R. 622-709) that they felt they might be subject to punishment for violating a rule of court—a rule not announced until after the damage was done and the jury was retiring to deliberate (R. 552). The existence of the prejudicial information (which clearly would not be admissible in evidence; *Michelson v. United States*, 335 U.S. 469, 475), the fact that some juror was pointing it out to the others (R. 685-687), and the fact that cautionary instructions were not given in time should clearly bring this case within the rule of *Marshall v. United States*, 360 U.S. 310.

Conclusion

For the reasons stated, a writ of certorari should issue to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

s/ William F. Walsh

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Attorney for Petitioner

Certificate of Service

I certify that five copies of the foregoing petition were mailed to The Solicitor General, Department of Justice, Washington 25, D. C., air mail postage prepaid, and that one copy was mailed to United States Attorney, United States Court House, Houston, Texas, postage prepaid, this 12 day of August, 1965.

s/ William F. Walsh

William F. Walsh, Esq.
Attorney for Petitioner

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20,721

WILLIAM L. PALMER, SR., Appellant

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the Southern District of Texas.

(December 7, 1964.)

Before WISDOM and GEWIN, Circuit Judges, and HANNAY, District Judge.

WISDOM, Circuit Judge: This appeal is from a judgment convicting the defendant of dispensing drugs which had moved in interstate commerce, a violation of 21 U.S.C. § 353.

The Government's evidence related to the purchase of four different lots of amphetamine drugs by a special employee, McMahon, who was working with agents of the Food and Drug Administration. Arrangements for two of the sales were made by McMahon and the defendant's son.

(1) *The appellant contends there was insufficient evidence to show that the drugs had moved in interstate commerce.* There is no merit to this contention. A micro-

analyst testified that the drugs were manufactured in Greenville, South Carolina. In *DeFreese v. United States*, 5 Cir. 1959, 270 F.2d 737, *cert. den'd* 368 U.S. 898, we held that such testimony of an expert was sufficient in itself to prove interstate shipment. *Cf. Archambault v. United States*, 10 Cir. 1955, 224 F.2d 925. In addition, however, an official of the Texas Department of Health testified there is no manufacturer of amphetamine drugs in Texas and that no source of amphetamine salts exists in Texas. Shipment of the active ingredient of a drug is the equivalent of shipping the drug. *Cf. United States v. 40 Cases, More or Less, of Pinocchio Brand 75% Corn, Peanut Oil, and Soya Bean Oil Blended With 25% Pure Olive Oil*, 2 Cir. 1961, 289 F.2d 343; *United States v. 39 Cases, More or Less, Mich. Brand Korleen Tablets*, N.D. Mich. 1961, 192 F. Supp. 51.

(2) *The appellant contends that the evidence is insufficient to prove that the defendant "consciously shared" in his son's delivery of the drugs to McMahon.* The pertinent language of the statute, 21 U.S.C. § 331, is: "The following *acts* and *the causing thereof* are . . . prohibited" (Emphasis supplied). Thus, "causing" is not qualified by any term requiring wilfulness, as in Title 18 U.S.C. § 2(b). See *Nye and Nissen v. United States*, 1949, 336 U. S. 613, 69 S.Ct. 766, 93 L.Ed. 919. Insofar as it constitutionally may do so, Congress divorced intent from culpability. Thus, in *United States v. Dotterweich*, 1943, 320 U. S. 277, 280, 64 S.Ct. 134, 88 L.Ed. 48, the Supreme Court said:

> "The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regula-

> tion. Such legislation dispenses with the conventional requirement of criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger. United States v. Balint, 258 U.S. 250. . . . The offense is committed, unless the enterprise which they are serving enjoys the immunity of a guaranty, by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce adulterated or misbranded drugs. Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing rel[a]tive hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard of the innocent public who are wholly helpless."

(3) *The appellant contends that the evidence was insufficient to show a "dispensing" within the meaning of the Act.* The Act uses the term "dispense", but does not define it. Etymologically, it means to weigh out, pay out, distribute, regulate, manage, control, etc. Black's Law Dictionary 557 (4th Ed. 1951). The term is particularly appropriate as applied to drugs, and a "dispensary" is a place where a drug is prepared or distributed. *People v. Cohen*, 1916, 94 Misc. 355, 157 N.Y.S. 591, 593. In context, the significance of the term is apparent: Congress felt that in the regulation of drugs the broad term "dispense" was more appropriate to the congressional purposes of the legislation than the more narrow term "sell". The statutory scheme establishes lawful methods

for dispensing drugs upon prescription; anyone dispensing drugs outside of the statutory scheme violates the law. *DeFreese v. United States*, 8 Cir. 1959, 270 F.2d 655, *cert. den'd* 1960, 361 U. S. 931; *United States v. 2600 State Drugs*, 7 Cir. 1956, 235 F.2d 913, *cert. den'd* 1956, 352 U.S. 848; *United States v. Gibson*, E.D.Pa. 1955, 135 F. Supp. 807. The decision on which the appellant relies, *Adams v. United States*, 5 Cir. 1955, 220 F.2d 297, is distinguishable in that it involved a "sale" to a purchasing agent or messenger of the real seller.

(4) *Finally, the appellant contends that the trial judge erred in denying the motion for a new trial based on alleged jury misconduct.* The appellant argues that he should be granted a new trial on the ground that there were newspapers in the jury which contained articles stating that he had been convicted on several occasions of violations of state and federal drug laws. The trial judge conducted a full hearing in connection with the question. All twelve jurors were called as witnesses and examined and cross-examined at length. Only two jurors admitted having seen the articles. And they had seen only the headlines. Each testified positively that he had not read the articles. The defense counsel was given a full opportunity to question the jurors and to present any additional evidence available to him. He failed to show that any juror had read any material of a prejudicial nature before or during the deliberation. In the circumstances, we conclude that the trial judge did not abuse his discretion.

We have carefully considered all of the appellant's other contentions. They are without merit.

The judgment is AFFIRMED.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1964

No. 20,721

D. C. Docket No. 63-H-78-Cr.

WILLIAM L. PALMER, SR., Appellant,
versus
UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before WISDOM and GEWIN, Circuit Judges, and HANNAY, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

December 7, 1964

Issued as Mandate:

APPENDIX "C"

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20,721

WILLIAM L. PALMER, SR., Appellant,

versus

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(June 23, 1965)

ON PETITION FOR REHEARING

Before WISDOM and GEWIN Circuit Judges, and HANNAY, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above entitled and numbered cause is hereby DENIED.

APPENDIX "D"

The Houston Press
Wednesday, May 22, 1963
Page 3

DRUG FIRM OWNER AGAIN FACES TRIAL

William (Tex) Palmer, owner and operator of a wholesale drug firm, goes to trial today in Federal Court before Judge James Noel on charge of illegal sale of drugs to truck drivers who bought the pills to stay awake on long distance hauls.

Drug representatives from all over the country have been subpoaened to testify on behalf of the government.

Undercover Work

Palmer, 55, and his son, Bill, were charged after the Food and Drug Administration received information of the illegal sales through an undercover agent.

U. S. marshals seized several hundred thousand amphetamine or "bennie" pills from the Palmers warehouse last March in the 5600 block of Telephone road.

The government charged both Palmer and his 26-year old son with the sale of 150,000 of the pills without a prescription.

The younger Palmer pleaded guilty to the charge, and it is possible the government could call on him to testify in the trial against his father.

In Trouble Often

The elder Palmer, a stout gray haired man, who has claimed in the past the government has persecuted him without reason, has been in and out of Federal court during the 15 years he has operated in the drug business.

This is the eighth time the elder Palmer has been in trouble with the law. He was convicted on three counts of selling drugs in unlabeled bottles and also been found guilty of violating various state regulations on pharmaceuticals in California, Arizona and Nevada. He is currently under indictment in New Orleans.

The Houston Chronicle
Wednesday, May 22, 1963
Page 6, Section 1

PALMER'S SON CALLED AS WITNESS IN TRIAL

His son has been subpoenaed as a government witness against William L. (Tex) Palmer, 55, of 2823 Linkwood, in a federal court trial on charges of illegally peddling pep pills.

The son, William Leonard (Bill) Palmer, 26, of 9807 Atwell, Apt. 13, switched his plea on the same charges from innocent to guilty on May 7.

The Palmers are accused of selling without prescription 150,000 stimulant drug tablets to a Houston truck driver in March.

Prosecutor Scott T. Cook said truck drivers use the tablets to keep awake on long trips.

The drugs, amphetamine and desoxyephedrine, can cause hallucinations and have been blamed for a number of serious accidents.

The jury trial was opening Wednesday before federal Judge James Noel.

Drug company representatives from seven states have been subpoenaed to testify on pep pill sales to the elder Palmer last year.

A subpoena has been canceled for John A. McGee, Nashville, Tenn., drug firm official convicted of illegal drug sales, because his testimony against the younger Palmer will not be needed.

Cook said evidence was developed in McGee's trial that McGee in the last six months of 1962 received 8.7 million pep pills from a drug company operated by the younger Palmer.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 460

WILLIAM L. PALMER, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 340 F. 2d 48.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1964. A petition for rehearing was denied on June 23, 1965. On July 19, 1965, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to and including August 20, 1965. The petition for a writ of certiorari was filed on August 16, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

787-159—65

QUESTIONS PRESENTED

1. Whether petitioner was adequately represented by appointed counsel.

2. Whether petitioner was entitled to a new trial because two jurors admitted having seen newspaper headlines concerning reports of the trial while it was in progress.

STATEMENT

After a trial by jury in the United States District Court for the Southern District of Texas, petitioner was convicted on four counts of an indictment charging the unlawful sale of drugs in violation of 21 U.S.C. 353 (Tr. 611).[1] He was sentenced to imprisonment for one year on each of the first three counts, to be served consecutively, and to a suspended term of imprisonment for two years on the fourth count (Tr. 734). The court of appeals affirmed.

1. The government's evidence may be summarized as follows:

An informer, working with the Houston, Texas office of the Food and Drug Administration, arranged to purchase without prescription from petitioner's son approximately 50,000 amphetamine tablets (referred to frequently as "bennie pills" by the witnesses) (Tr. 59–63). An intervening automobile accident involving petitioner's son prevented the planned delivery of the tablets to the informer (Tr. 64–65). The informer then contacted petitioner, whose wholesale drug warehouse was the source of the amphetamine tablets, and asked him to follow through on the transaction (Tr.

[1] Reference is to the consecutively paginated volumes of the transcript of trial.

66–67, 159–160). Petitioner agreed to do so, arranged a meeting with the informer, and delivered approximately 38,000 amphetamine tablets to him on March 12, 1963 (Tr. 68–71). The following day petitioner delivered the remaining 12,000 tablets to the informer at the warehouse (Tr. 71–77). Representing himself as the largest dealer in the area in such drugs, petitioner solicited further business from the informer and arranged to sell him 50,000 more amphetamine tablets (Tr. 73–77). Later the same day, petitioner's son delivered 50,000 tablets to the informer, who in turn met with petitioner that evening and paid for the tablets (Tr. 75–81). All of these meetings and transactions were observed from a distance by agents of the Food and Drug Administration (Tr. 72, 163–166, 168–173, 177–181, 202–211, 219–222, 262–268, 529–531, 537–541).

2. After the trial, but prior to sentencing, counsel for petitioner requested a new trial asserting that the jurors had read newspaper stories regarding the trial while it was in progress (Tr. 619–624). The district court, after a hearing, determined that the allegations of misconduct were without substance (Tr. 623–721). Testimony of the twelve jurors[2] who served on the case established that although some newspapers had been present in the jury room during the trial of the case, they had all been removed prior to submission of the case to the jury for deliberation (Tr. 626–627, 640–641, 645–646, 654, 657–658, 662–666, 668–670, 673,

[2] The testimony of one alternate juror was not available, but it was agreed that his testimony would not have supported the allegations of the motion (Tr. 620–621, 695–697).

678, 682, 686, 692, 697–698). Two of the jurors testified that they saw a headline on an article about the trial, but the headline merely stated that petitioner was on trial, and neither juror read any part of the article (Tr. 646–650, 686–687). None of the other jurors saw or read anything at all about the trial while it was in progress (Tr. 640–641, 654, 658, 666, 668–671, 673, 675, 678, 682–683, 692). There was no discussion among the jurors regarding any newspaper articles about the trial (Tr. 649, 667, 679, 693).

ARGUMENT

1. Petitioner's allegation, now made for the first time,[3] that he was inadequately defended at his trial, is completely without substance and is wholly unsupported by the record. Petitioner bases this allegation on isolated remarks made by his appointed counsel during trial and quoted out of context (Pet. 4–5). Defense counsel's remarks appear to have been directed toward minimizing the impact of the evidence provided by numerous government witnesses and toward evoking sympathy for his client. By saying, "if he [the assistant United States attorney] proves everything he says he is going to prove, all you can do is convict" (Tr. 56), defense counsel was laying the foundation for the defense of the case—*i.e.*, that the

[3] The same senior counsel of a Texas firm who, assisted by an associate, represented petitioner at trial, also represented him during the hearing on the motion for new trial, at which time a third lawyer entered the case on behalf of petitioner (Tr. 26, 38, 619–624). The third attorney represented petitioner in the court of appeals, but subsequently withdrew because of illness (see 340 F. 2d at 49; petitioner's motion for extension of time, filed with this Court, pp. 1–2).

government could not prove its allegations—and was not asking the jury to convict petitioner, as petitioner now asserts (Pet. 6).

The record belies petitioner's assertions of inadequacy on the part of his defense counsel. It reflects that defense counsel cross-examined government witnesses vigorously (Tr. 81–150, 188–196, 200, 212–216, 223–231, 237–261, 269–273, 285, 304–305, 309), and conducted a searching cross-examination of the government's medical expert (Tr. 237–261). The record also shows that defense counsel called numerous defense witnesses to establish petitioner's theory of defense (Tr. 311–344, 381–390, 393–395, 398–415, 435–438, 443–483). It is clear from the questioning of witnesses by defense counsel and from his closing argument on the case that he fully understood the application of the pertinent law to the facts of the case. Petitioner claims that his counsel did not request additional instructions to the jury (Pet. 5), but he fails to specify any error or inadequacy in the charge.

2. The district court did not abuse its discretion in refusing to grant petitioner a new trial on grounds of alleged jury misconduct. Petitioner failed to show that any juror had been influenced in any way by the mere presence of some newspapers in the jury room prior to deliberation. There was no evidence that any juror had read newspaper stories concerning the trial; only two jurors saw an innocuous headline. There was no discussion among the jurors of any newspaper articles or any prejudicial information contained in such articles. The district court specifically instructed the jurors, prior to deliberation, not to watch tele-

vision or read newspapers concerning the case (Tr. 552), and not to discuss the case until time for their deliberation (Tr. 57–58, 331–332, 552).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
DANIEL H. BENSON,
Attorneys.

SEPTEMBER 1965.

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WILLIAM L. PALMER, SR., *Petitioner*

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UNITED STATES OF AMERICA, *Respondent*

REPLY TO BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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UNITED STATES OF AMERICA, *Respondent*

REPLY TO THE BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

A.

The Defense

Because a court-appointed lawyer felt that he was free to defend his captive client without performing the pre-trial preparation required in all contested litigation, this case imposes a special responsibility upon this Court to establish some minimum standards for the performance of

lawyers whose presence at the side of the accused is essential to preserve the very jurisdiction of the trial court. *Johnson v. Zerbst*, 304 U.S. 458; *Gideon v. Wainwright*, 372 U.S. 335.

To determine whether minimum standards of diligence were met by appointed counsel in this case, we do not believe it is necessary, or even desirable, for the Court to immerse itself in the "infinite variety" of moment-to-moment trial decisions which "are not justiciable issues." *Mitchell v. United States*, 259 F.2d 787, 792.

Nevertheless, since the Brief in Opposition suggests that counsel did what might be expected of him, we feel that the Court should consider the following:

1. It is true that the defense did call witnesses. The first of these witnesses was petitioner's son, who was under subpoena as a government witness (R. 393) and whose crucial testimony "on behalf of the Government" was so important as to cause Petitioner's retained attorney to withdraw from Petitioner's case (R. 22).

2. Another "defense witness" was a federal food and drug investigator, apparently called in part to establish that the government informer and star witness was "acting as a public, civic-minded citizen throughout this whole transaction" (R. 388).

3. The only other "defense witness" (other than Petitioner himself and the informer, who was recalled by the defense; R. 403) was Petitioner's original lawyer, about whom counsel said in the presence of the jury, "I want to show whatever bias or prejudice he has against my client" (R. 400).

To call or not to call witnesses, to cross-examine or not to cross-examine witnesses, to make any of the other decisions which arise during the course of a criminal trial, depends on preparation which was admittedly absent in this case (R. 56-57, 229, 564). The ostensible exercise of rights available to a defendant is no substitute for the plain hard work which must precede intelligent judgment. As the Ninth Circuit said in *Brubaker v. Dickson*, 310 F.2d 30, 39 (1962):

> "Appellant does not complain that after investigation and research trial counsel made decisions of tactics and strategy injurious to appellant's cause; the allegation is rather that trial counsel failed to prepare, and that appellant's defense was withheld not through deliberate though faulty judgment, but in default of knowledge that reasonable inquiry would have produced, and hence in default of any judgment at all."

As in *Johnson v. United States* (5 Cir., 1964, 328 F.2d 605, 606), "we have the unusual situation of trial counsel himself (not the counsel here on appeal) making this charge against himself" through admissions during trial. When an appointed lawyer concedes in open court that he has investigated neither the facts (R. 56-57, 564) nor the law R. 229), his certificate of neglect should compel a new trial.

We cannot believe that in establishing a national constitutional policy this Court is prepared to declare that a lawyer may satisfy his obligation to the public without at least some regard for the preparation which all lawyers and courts know is necessary. Indeed, Mr. Palmer had a right to expect "a devotion to the interest of the accused that was at least equal to that expected from compensated

counsel of an accused's own choosing," *Johnson v. United States*, supra, 5 Cir., 1964, 328 F.2d 605, 606. In *Gideon* itself, this Court called for counsel who would both "prepare and present" the defenses (372 U.S. 335, 344), and in *Douglas v. California*, 372 U.S. 353, 358, the Court recognized "the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf" in connection with an appeal.

In determining what is necessary, the Courts have required "study or preparation for useful participation in the trial" (*Turner v. Maryland*, 4th Cir., 1962, 303 F.2d 507, 511) by "counsel reasonably likely to render *and rendering* reasonably effective assistance" (*MacKenna v. Ellis*, 5 Cir., 1960, 280 F.2d 592, 599, emphasis by the Court).

B.

When Petitioner Was Not Represented by Appointed Counsel, He Was Represented by Disqualified Counsel

Footnote 3 to the Brief in Opposition (Br. 4) does not fully explain the circumstances under which Petitioner was represented by the various attorneys who appeared on his behalf.

The "third lawyer" did not "*enter*" the case during the hearing on the motion for new trial. He then asked "permission of the Court to *re-enter* this case" (R. 619; emphasis added) and did represent Petitioner on appeal to the Fifth Circuit (see 340 F.2d at 49). The "third lawyer" was actually the first lawyer in the case, representing both Petitioner and his son (R. 2-3) until the son pleaded guilty (R. 15). Later, because the son was subpoenaed "as a witness on behalf of the Government" (R. 22, see R. 393),

the "third lawyer" requested permission to withdraw as attorney for Petitioner because of a conflict of interest which was specifically acknowledged by the prosecution (R. 22). Calling the "third lawyer" as a defense witness, appointed counsel announced in the presence of the jury that he wanted "to show whatever bias or prejudice he has against my client" (R. 400).

To suggest that continued participation in these proceedings by the "third lawyer" vitiates appointed counsel's lack of diligence is to ignore the fact that a lawyer cannot represent conflicting interests (*Glasser v. United States*, 315 U.S. 60, 70), whether the attorney is chosen by the client or court-appointed (*Porter v. United States*, 5 Cir., 1962, 298 F.2d 461, 462).

Indeed, both the government and the Court of Appeals below have recently accepted the duty of determining for themselves whether a lawyer may represent more than one client whether or not the clients consent. (*Randazzo v. United States*, 5 Cir., 1964, 339 F.2d 79, 80-81). It thus appears that appropriate disposition of this case might be remand to the Court of Appeals so that a lawyer unfettered by conflicting responsibilities may seek a determination that appointed counsel in the trial court did not meet minimum standard of diligence.

Conclusion

For the reasons stated, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case, or the case should be remanded to the Fifth Circuit with instructions to determine whether the attorney who represented Petitioner

was disqualified to do so and whether Petitioner is thus entitled to present his appeal anew to that Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that five copies of the foregoing petition were mailed to The Solicitor General, Department of Justice, Washington, 25, D. C., air mail postage prepaid, and that one copy was mailed to United States Attorney, United States Court House, Houston, Texas, postage prepaid, this 26th day of September, 1965.

William F. Walsh, Esq.
Attorney for Petitioner